

**MINUTES  
MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION**

**1:00 p.m.  
Thursday, May 17, 2007  
DNRC Bannack Room  
1625 11<sup>th</sup> Avenue  
Helena, MT**

- I. CALL TO ORDER:** Honorary Chairman Gene Etchart, substituting for Chris Tweeten, called the meeting to order at 1 p.m. welcomed everyone and asked for introductions from attendees. (**Attachment 1, Agenda**)

**ATTENDANCE: Commission Members:** Gene Etchart, Lorents Grosfield, Bill Tash, Art Noonan, Jesse Laslovich, Steve Hughes. Chris Tweeten and Jack Ross were unable to attend.

**Staff Members Present:** Susan Cottingham, Bill Greiman, Faye Bergan, Joan Specking, Jay Weiner, Sonja Hoeglund, Bob Levitan, Stan Jones.

**Others Present:** (See Attachment 1, Sign-in Sheet)

**APPROVAL OF MINUTES:** The minutes from the Dec. 14, 2006 meeting were deferred for approval at the next Commission meeting.

- II. CHAIRMAN'S REPORT:** Susan welcomed the Turtle Mountain Chippewa attendees who drove over from North Dakota. She outlined Commission compact bills passing the 2007 legislature, including the Forest Service compact (SB248), the U.S. Fish & Wildlife Service Bowdoin National Wildlife Refuge compact (HB717), USDA Agricultural Research Service Ft. Keogh compact (HB187), USDA ARS Sheep Experiment Station compact (HB 188). Other Commission bills passing included HB829, the bill designating \$15 million of state funds to help mitigate the impact of the Blackfeet water settlement. It was intended that the Blackfeet compact would be added to HB829 but it was not yet ready at the time the legislature adjourned. Susan thanked all the Commission members and the staff for their hard work on these compacts. Susan clarified that it was the end of a 4-year cycle for Commission appointments. Chris Tweeten has been reappointed by the Attorney General. All the legislative appointees have been reappointed. June 1 would be the end of the terms for the gubernatorial appointees including Gene Etchart, Lorents Grosfield and Steve Hughes. Steve Hughes has applied for reappointment. Tara DePuy resigned in 2006 and her position must also be filled. Later in the day there would be a photo session for Commissioners and staff.
- III. ATTORNEY GENERAL'S REPORT:** Candace West was not able to attend the Commission meeting so the report was deferred until the next Commission meeting.

**IV. BLACKFEET NEGOTIATIONS:** Susan had hoped that they would have a finalized compact for the Commission to approve but it was not ready. In the hopes they would have it ready for the 2007 session they did rounds of public meetings in Cut Bank and Valier. There are several issues that are not resolved including Birch Creek and regarding the Tribal ability to market water off the Reservation. The general plan is to keep working on these issues and get agreement in the next month or so. The next opportunity for legislative approval is 2009. Therefore the Congressional delegation has agreed on request of the governor to take a compact to Congress first.

Jay Weiner thanked the outgoing members of the Commission for their hard work. He gave a summary of the main compact provisions still requiring work. One is how to bridge from the status quo on Birch Creek to the future Tribal development they are proposing to quantify. They are looking at a deferral agreement which would make a payment to the Blackfeet Tribe using the HB829 money in exchange for the Tribe deferring to the status quo until such time as a rehabilitated Four Horns Reservoir can be completed. The second issue they are stuck on is discussions of the conditions attached to off-reservation use of the Tribal water rights. They would like to come to a settlement recognizing the Tribes' ability to market water off the reservation, which is needed for the Birch Creek users. The parties have tentative ideas as to how to move the compact forward and remain cautiously optimistic.

Susan gave a summary of the public meeting in Chinook which was held in May to address the concerns of Milk River water users regarding the Tribes' St. Mary water rights. She said the Commission would probably do another round of public meetings after the remaining issues are settled.

Steve Hughes asked if there were any issues associated with taking a Blackfeet compact to Congress prior to taking it to the Montana legislature, for example the Commission legislative intent. Susan said the legislative intent does not specify the order of approval and that Pam Williams of the Dept. of the Interior said going to Congress first is more the norm for other states. Susan said there would be contentious issues with a federal bill. Jay Weiner said this was done most recently on the Nez Perce settlement Idaho.

Bill Tash asked about the transbasin diversion and the ability to store water. Jay explained that Four Horns Reservoir was the current storage in Badger, and that Badger Creek has about three times the water supply as Birch Creek. The existing facility and the topography make this a cost-effective water project.

Faye asked who the Commissioners on a Blackfeet Negotiating Team would be if the Commission went out for additional public meetings prior to taking a settlement to Congress. Jay said they would need to see who the new Commissioners would be. He said there would need to be public meetings first when a compact settlement was agreed on by the Tribe and the State, and then again when federal legislation was written. Susan said former Commission members cannot be paid beyond June 1, 2007.

Lorents said the same issues have been unresolved for a number of weeks and asked what makes the teams think they will be resolved. Jay explained that Chris Tweeten has been attending the legal working sessions, as have several Blackfeet council or water committee members in order to help come up with some acceptable potential solutions, although these are not negotiating sessions where decisions are actually being made. Cheryl MacAuthor, representative from Sen. Jon Tester's office, asked how the Commission expects the public to react to taking a settlement to Congress first. Jay said it may help in terms of members of the public who are unsure now of the compact. Lorents asked if the significant federal issues would be settled in time for the 2009 legislature. Susan said there is momentum so they will continue working. Gene asked if there were any further comments or questions regarding the Blackfeet. John Bloomquist, representing the Pondera County Canal and Reservoir Company, thanked the staff and Commission for their work on HB829. He said they have been in constant contact with Commission staff on the issues. He said Congress will really have to step up but they will keep working with Jay and the other staff members. Susan said she wanted to make it clear that the parties will have a completed compact prior to taking it to Congress.

V. **PLANNING FOR COMMISSION'S REMAINING WORK – 2007-2009:**  
(The order of these items was changed somewhat from the agenda)

a. **Remaining Staff Work**

1. **Crow** – Faye explained that once the Crow compact passed the legislature in 1999, there were Tribal government issues for a few years. At this time the Crow is fully committed to getting the compact through Congress, and are working to get a Congressional package put together. They are focusing on providing drinking water, water and sewer and rehabilitation and expansion for irrigation projects on Reservation. They have completed their work for a comprehensive water supply system which is in the neighborhood of \$300 million, Reservation wide, and also including Hardin which is off-reservation. They hope to complete the irrigation component soon and think it will be about \$40 million. There is a draft of federal legislation for the Crow compact which the legislative council has reviewed. They are proposing some alternative revenue streams from power generation, from mineral royalties and land. They hope to submit this to the Congressional delegation as early as mid-June, 2007. The Commission hopes to help facilitate some discussions with the Tribe and Wyoming, especially on the Big Horn River and the Little Big Horn – the Tribe would like to get some issues resolved. Faye and Susan will meet with Wyoming on June 6<sup>th</sup> in Jackson Hole. Susan noted that the Crow Technical Report also remains to be completed.

2. **Fort Belknap**- Jay explained that Sen. Tester's office has agreed to carry the Fort Belknap legislation, which was originally submitted in September and has been revised. There are several political issues including land transfers which are sensitive. A consistent message from OMB is that there is no money and that non-cash contributions are needed (such as land transfers) to bring the funding needed down. The State would like to trade out of the school lands on the Reservation for other federal land in the State. Another piece is the submarginal (BLM) lands – some lands are part of the Reservation

but others they would like to have access to. Other lands are those which were foreclosed lands on the Reservation by the federal government. Some of the lands are near Dodson diversion dam but there is some question as to the ownership/title of the land under the diversion dam – the Tribe would like them transferred back to Tribal ownership. The fourth area of the land exchange is drawing some controversy and includes lands in the Grinnell notch which was removed from the Reservation in 1895. The Tribes would like to have the non-fee lands transferred back to them. Fee land owners would continue to have access to their property. There is some concern by several landowners in the area. Senator Tester's office plans to do some public meetings up there and Jay will attend. Some constituents have been concerned that the public has not been involved in the process however, there has not been a federal bill draft to this point. There will be an opportunity for public input prior to the introduction of the bill and during the Congressional process.

Break for photographs of Commission members by Rick Bush, and presentation of certificates to outgoing Commissioners Gene Etchart (on the Commission since May 1, 1986), Lorents Grosfield and Steve Hughes. Steve said the staff is hard working and a pleasure to work with. Gene said he has never seen a more dedicated or harder working staff than this one.

#### **B. Remaining Negotiations Turtle Mountain**

The next item on the agenda was changed to facilitate discussion with the Turtle Mountain tribal members. Susan thanked the Turtle Mountain attendees for making the long trip from North Dakota to Helena for the meeting. The chairman, David "Doc" Brien, brought three hand-made willow baskets which he presented as a gift for the Commission office – he said this gift giving was a 1000-year-old tradition, and Turtle Mountain is among the few still doing basketry.

Thomas Davis, Turtle Mountain Tribal member and allottee, said they were at the meeting because they were given land in Montana as an exchange process beginning in 1829. 2691 allotments were issued, almost 2000 on the eastern Montana North Dakota border. There are 557 left out of that number. The Turtle Mountain Chippewa have more than 30,000 people and they find they need land. In North Dakota they are trying to get started on negotiations but there is no general stream adjudication process in that state. It has never been the Tribes' intention to litigate and they would like to develop a partnership with the State of Montana. They have a lot of people interested in agriculture. Currently they have 72% unemployment in North Dakota and they feel if they could settle the allotment situation they could cut that in half and help feed people and reduce their dependence of the federal government. They have been told some of the allotted land does not have availability of water, but he said his ancestors would never have walked to Montana to allotments if there was no water. The Dept. of the Interior wanted them to possibly exchange some of the allotments for pieces of land in places easier to get infrastructure. He acknowledged that the federal government has to be involved. The federal government says the Tribal government has no jurisdiction over the land. The Tribe has passed a resolution and amended their constitution to give that authority to the

Tribal government. They are waiting for a solicitor's opinion on that. Tom Davis said the federal government has never been a friend to his people on this issue. If they had been Turtle Mountain would have been on their land years ago.

Steve Hughes is the chair of the current Commission's negotiating team. Gene said the Commission is willing to sit and work with the Tribe to the extent that they are able. Steve said he has visited with Susan about the Turtle Mountain issues and had hoped to go back to visit the Reservation. He asked how many acres the 557 allotments held and Tom said it is 83,000 acres. He explained that they have allotments in North Dakota also and that all but 13,000 acres on the reservation is allotted. Tom said their Tribal government is relatively new.

David Doc Brien said the landholders want to make sure they have access to water on their land for families, farming and ranching, etc. He said it would behoove them to quantify them and make sure there would not be water disagreements. He explained that their reservation was created in 1885 by the McComber (10 cent) agreement. When it was taken by the government, the government replaced it with allotments in S. Dakota, N. Dakota and Montana. The reservation had been reduced as the result of a bad census during the period between 1882-1884. He gave some historical background on the region and the Reservation and allotments. He said information on the allotments is scattered around between different federal agencies, the allottees, individuals, etc., and it needs to be compiled so that they are able to have all groups look at the information. They are honored to be in the great state of Montana and it almost feels like home. They have an historical affinity for Montana as so many of their people; Chippewa, Cree and Metis' were and are still here.

Tom Davis said the Tribes' goal is to continue with the process, and he would like to get some benchmarks together with the Commission and figure out where they want to be 6, 9, and 15 months from now. He knows some people think they cannot do it, but he believes goals are essential to begin the process. He has been involved with Turtle Mountain water issues since 1978. He said they have received notification from the BOR that if they don't settle their water rights by 2009, the feds will litigate on the Tribes' behalf. He said the feds have done a lousy job for them so far. They have watched what Montana has done with the Tribes and said they have a good job. Mr. Brien said there is a unique situation with the Tribe and the Turtle Mountain Allottee Association because most of the people have dual status and about 80 to 90% of allottees are Tribal members. The Allottee Association is an independent non-profit with by-laws. Tom Davis said that the Tribe did purchase an allotment so the Tribal government has some land. At this time there is no representation for the lands that were allotted. That is why the situation exists. They have to find the allotments but they have found out that all the pins and markers on the land are now gone. He welcomed comment and thanked the Commission for their time.

Susan said the staff has done a lot of legal research on Turtle Mountain allotments and recognize that the treaty is clear that the allotments have the same legal rights as the Reservation lands – they have reserved water rights. They have a very complicated situation with a Reservation in N. Dakota and 577 allotments with multiple owners. She

said she appreciates Tom wanting to separate the federal trust from the state negotiations with Turtle Mountain but it is not easily done. There is a problem with who represents the allottees – the same as there was in 2001 when they were discussing the same issue. The U.S. has large unresolved issues about who represents allottees and it remains unresolved. Six or seven years ago the Commission and the Tribe wrote a letter and requested an assessment team to be appointed to look at the legal landscape and what it would take to have the Turtle Mountain government sit down with Montana. At the time the feds rejected the request. It is a major legal roadblock. The Commission respects what they want to do to work on a process. But she does not think they can put aside the issue of representation for the allottees. They will have to have a meeting with Turtle Mountain and the feds to discuss things. A Turtle Mountain compact would have to have some federal presence. Some complicating factors are the 6000+ allottees owning the 557 allotments. Some of the allotments are leased but they don't know who is leasing them. Tom said they are waiting for a solicitor's review of their recent election regarding authority of Tribal government to represent allottees, and that may help. The treaty is clear in that the allotments are to be treated as the Reservation. Susan explained for the Commission members that the allottee issue is not new but noted this is unique as the allotments are off the Reservation. She said they appreciate what Turtle Mountain wants to do.

Faye said the Commission shares the Tribal goals to have the water rights adjudicated and also wants a process that is not overwhelming and is fair to the Tribe. She said to be honest a settlement would probably need some court oversight perhaps some filings. They have to see if they can get the solicitor's opinion in a timely fashion as the feds have not agreed to appoint a team. The parties have to get the federal attention and get them into the process. Tom said timing is important and now, the legislative body in North Dakota includes advocates for the Tribe. Mr. Brien noted that the Tribe owns a 147 acre allotment and perhaps that could be used as a template for negotiating the others – with the oversight of the appropriate group – when they find out who represents the allottees. Susan said they want to try to facilitate something with the Tribe. The problems are legal representation and jurisdictional problems as well as the technical problems of not knowing where the allotments are. She will continue to talk to Pam Williams. Tom said they have requested a meeting with the Billings area office – and maybe the Commission and the Tribe could meet at the same time. Susan said the letter from the United States to the Tribe means they are preparing for the Commission sunset date. Faye said having a meeting would let the feds present their position directly and then the Tribe and state can look at options.

The Commission returned to the agenda:

**B. Remaining Staff Work**  
**4. Bowdoin**

Jay Weiner explained that the Comprehensive Conservation Plan is starting to move forward with the U.S. Fish & Wildlife Service. Stan Jones will be the Commission point person for that. The MOU that is attached to the Compact is still to be worked out

between the State and the FWS to impose some conditions on the compact relating to the circumstances under which they can use their water right. The Commission wants to convey that it is imperative the Refuge become a flow-through system. They also want to identify some technical benchmarks for the MOU which they want to complete before the Commission sunset, however he expects drafting will not start before next summer.

## **5. Forest Service**

Faye said DNRC is working to enter the 78 water rights in the compact into the DNRC data base. They are finishing up the abstracts for about 300 individual water rights scattered throughout the Forest Service acreage. They will facilitate a meeting with DNRC to talk about Forest Service filing for water reservations in the next couple of months. FS will turn in some water reservations this summer. Stan will have some work in initial quality control and Susan said DNRC got an FTE to work on this. There is 180 days from April 17<sup>th</sup> to do the Water Court filings and they need to do the Staff Report, motions and briefs. One question is how extensive notice needs to be for filing in Water Court and who will pay for that.

## **6. Agricultural Research Association**

The abstracts are being worked on for Ft. Keogh and the Sheep Station. The signature pages will be sent around then signed by the Governor. There are also staff reports and Water Court filings.

The agenda moved back to remaining negotiations.

### **A. Remaining Negotiations**

#### **1. CSKT / Bison Range**

Susan said Clayton Matt called and they would like to get started on negotiations. The Commission has \$195,000 of contracted services funds for some of the technical work needed to get that done. She told Clayton they could not get started until they have a new Commission. The Tribal Council will be the negotiators. Susan said she is still advocating for a mediator to move them forward on the issues. The Commission is still hoping that the Flathead Irrigation Project transfer talks move forward.

Steve Hughes gave a summary of transfer progress. The Tribe last fall asked what the FJBC would think of a 638 contract, which was not what the FJBC wanted to do. The Tribe asked the FJBC to go to DC and find out about 638 contracts, which the federal people said would not work. The extension of the Commission became an issue. The Tribal Council was meeting with the FJBC and hopefully the discussion would be ended. The ES should be done by September and then there will be public comment. The biggest issue remaining is the personnel issue and the federal employees would have to be rift and will have to reapply. Meanwhile project personnel are becoming less concerned about job performance and the Project is having difficulties. They are trying to impress on the Council that the parties need to get this done. He hopes the Commission and staff

continue to insist the transfer needs to be completed. They hope to have a contract signed the first of the year.

Susan noted that management of the Bison Range has been under bitter dispute. The primary issue would be who the water belongs to. Jay said the only way to do it is to quantify it under the CSKT and say if and when the Bison Range belongs to the CSKT they get the water right also.

## **2. Charles M. Russell National Wildlife Refuge**

Faye said a court case was decided a few years ago determining that the lessees owned the water rights as opposed to the lessors. The United States did not appeal. Given that it may be in the FWS best interest to litigate and possibly get a better priority date. The FWS needs to let the Commission what they intend to do. The Commission has not heard anything official.

## **3. BLM**

Faye explained that the Commission has a compact with BLM which has not yet been filed in the Water Court. The question is how extensive the notice needs to be and the U.S. DOJ needs to make that decision. In 2001, the Clinton administration created the Missouri Breaks National Monument. The question is whether or not they will claim reserved water rights for that. There are some factual problems involved. According to the Solicitor's Office the issue was discussed so they know this is an issue and they need to decide what to do and let the Commission know.

## **C. Transition Report and Implementation Plan – Post -2009**

Susan explained that there had to be staff remaining to do implementation work getting technical reports and other work done for the Water Court. There is archiving work; creation of a digital library; a thirty-year report; compact boards, etc. There is a transition plan to move 5 FTEs to DNRC water resources in the last 6 months of the biennium. Funding has been switched to make sure implementation work would be done. The other issue is trying not to lose staff. By June 2008 the Commission has to create a implementation plan to submit to the EQC, including what needs to be done to sunset; if an extension is needed; termination of negotiations, and so on. Susan will work with Todd Everts of EQC on the schedule for that.

## **VI. PROGRAM MANAGER'S REPORT**

Susan was invited to go the Washington D.C. for a Western State Water Council meeting on funding of Indian water settlements, as well as for a meeting with Senator Jon Tester.

**MOTION:** Lorents Grosfield made a motion that the Commission approve Susan's out of state travel to Washington D.C. for the WSWC and Tester meetings.

**SECOND:** Bill Tash

**PASSED UNANIMOUSLY**

Susan said the annual Indian Water Rights Settlement conference will be at the end of August in Albuquerque. She said some of the new Commissioners might want to attend. Jay Weiner said he might want to attend also. CLE credits are available. She will ask Commissioners for approval at the next Commission meeting.

Susan asked the Commission to approve a trip to the Water Information Management Workshop in Seattle Washington at the end of September. Sonja Hoeglund and Bill Greiman would drive and it would cost approximately \$650.

**MOTION:** Steve Hughes made a motion that the Commission approve travel for Sonja and Bill to this conference.

**SECOND:** Bill Tash seconded the motion

**MOTION PASSED UNANIMOUSLY.**

Susan asked the Commission to approve for Faye Bergan and Susan to travel to Jackson Hole, Wyoming to meet with the Wyoming State Engineer's Office about the Crow Compact.

**MOTION:** Steve Hughes made a motion that the Commission approve travel for Susan and Faye to Jackson Hole, Wyoming.

**SECOND:** Bill Tash seconded the motion

**MOTION PASSED UNANIMOUSLY.**

The final approval item for the Commission was a request for new computer expenditures. (See Attachment 3) The requests are based on the timeline DNRC has for computer replacement. Replacement costs would be approximately \$11,000.

**MOTION:** Steve Hughes made a motion to approve the request for expenditures for computers for Commission staff, on or before July 1 depending on the staff director's decision.

**SECONDED:** Gene Etchart seconded the motion

**MOTION PASSED UNANIMOUSLY.**

**VII. PUBLIC COMMENT**

Terry Zontec said he would put together a report on the meeting for Pam Williams.

Mike Murphy congratulated the Commission and crew for the good work they have done and commented that he had not opposed the sunset extension because of the Commission but because of the progress being made and support for the Commission.

Lorents Grosfield echoed comments on the staff and said it is a high quality staff.

Gene noted he had voted against sunset because he was fearful they would lose high quality staff but it hasn't happened and it is a tribute to the staff.

Meeting Adjourned.